Supreme Court, U.S.
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No. 95-1889

In the Supreme Court of the United States

OCTOBER TERM, 1995

BECHTEL ENERGY CORPORATION, PETITIONER

v.

ROBERT B. REICH, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether the Secretary of Labor's order denying petitioner's motion to dismiss a whistleblower complaint and remanding the case to an administrative law judge for further proceedings is immediately reviewable by the court of appeals as a collateral order under Section 210(c) of the Energy Reorganization Act of 1974, 42 U.S.C. 5851(c) (1988).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unreported. The orders of the Secretary of Labor (Pet. App. 2a-3a) and of the administrative law judge (ALJ) (Pet. App. 4a-5a) are unreported. Prior orders of the Secretary and the ALJ (Pet. App. 6a-14a, 15a-21a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1995. A petition for rehearing was denied on February 19, 1996. Pet. App. 30a. The petition for a writ of certiorari was filed on May 20, 1996 (a

Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The employee protection provision of the Energy Reorganization Act of 1974 (ERA) prohibits employers from discharging or otherwise discriminating against "nuclear whistleblowers," *i.e.*, employees who complain about nuclear safety violations. 42 U.S.C. 5851(a) (1988).[1] An employee who believes that he has been discharged or otherwise discriminated against may file a complaint with the Secretary of Labor within 30 days. 42 U.S.C. 5851(b)(1) (1988); see 29 C.F.R. 24.3(d). The ERA requires the Secretary to investigate the alleged violation and notify the complainant and respondent of his initial determination as to whether a violation has occurred. 42 U.S.C. 5851(b)(2)(A) (1988); see 29 C.F.R. 24.4(a)-(d)(1). A party dissatisfied with that determination may request a hearing before an ALJ. 42 U.S.C. 5851(b)(2) (A) (1988); 29 C.F.R. 24.4(d)(2)-(3), 24.5. After the hearing, the ALJ must issue a recommended decision. 29 C.F.R. 24.6(a), That decision is then transmitted with the record to the Secretary, who must issue a final order. 29 C.F.R. 24.6(a) and (b). Unless the administrative pro-

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[1] The ERA was amended in 1992, but because the complaint in this proceeding was filed before the amendments' enactment, the pre-amendment version of the Act applies to this case. See 42 U.S.C. 5851 note (providing that the amendments shall apply to claims filed on or after their October 24, 1992, effective date). Although the differences in the two versions of the Act have no effect on the question of appellate jurisdiction presented in this case, we note that petitioner incorrectly relies on the amended version of the Act, Pet. 16-17, and reprints that version in its appendix, Pet. App. 31a-37a.

ceeding is terminated by the Secretary on the basis of a settlement agreed to by the Secretary, the person alleged to have committed the violation, and the complainant, the Secretary must issue an order either providing the relief prescribed by the ERA or denying the complaint.[2] 42 U.S.C. 5851(b)(2)(A) (1988); see 29 C.F.R. 24.6(b) (final order). "Any person adversely affected or aggrieved" by an order of the Secretary "may obtain review of the order" by timely filing a petition for review in the court of appeals for the circuit in which the violation allegedly occurred. 42 U.S.C. 5851(c)(1) (1988); see 29 C.F.R. 24.7.

2. John Corder, a former employee of petitioner Bechtel Energy Corporation, filed a complaint with the Department of Labor (DOL) alleging that petitioner constructively discharged him for whistleblowing activities protected by the ERA. Pet. 2. Dissatisfied with the determination by the DOL's Wage and Hour Division that no violation had occurred, Pet. App. 53a-55a, Corder requested a hearing before a DOL ALJ. Pet. 3. In 1988, before a hearing was held, petitioner and Corder entered into a settlement agreement under which petitioner agreed to pay Corder $67,500 in exchange for release of all claims against petitioner, including claims arising under laws other than the ERA.[3] Pet. App. 7a, 19a n.3.

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[2] If a violation is found, the Secretary may require abatement of the violation, order reinstatement with back pay, award compensatory damages, and/or require the violator to pay the employee's costs and attorney's and expert witness fees. 42 U.S.C. 5851(b)(2)(B) (1988); 29 C.F.R. 24.6(b)(2) and (3).

[3] Corder had filed a state court action against petitioner, which was also resolved by the settlement agreement. Release and Settlement Agreement at 2, 8; see Pet. App. 28a.

Based upon the settlement agreement, the ALJ issued an order recommending that Corder's ERA claim be dismissed with prejudice. *Id.* at 15a. Petitioner, "assuming [that] the Secretary would approve the settlement agreement," thereupon paid Corder $67,500 in conformance with the agreement. Pet. 3.

3. In 1994, the Secretary rejected the settlement agreement between petitioner and Corder because it contained confidentiality provisions he deemed to violate public policy. Pet. App. 15a-21a. Although the Secretary in the past had severed similar provisions from settlement agreements and enforced the remainder of those agreements, the Fifth Circuit in *Macktal* v. *Secretary of Labor*, 923 F.2d 1150 (1991), disapproved that practice, holding that the Secretary must either approve the agreement as written, or, if unable to do so, negotiate a new agreement or remand the matter for a hearing. Following the Fifth Circuit's decision in *Macktal*, the Secretary ruled that because he could not enter into the settlement with the confidentiality provisions, the case should be remanded to the ALJ for further proceedings. Pet. App. 21a.

4. On remand, no new settlement was negotiated, and Corder did not return the $67,500 he had received under the earlier agreement. Pet. 5. Petitioner then moved to stay proceedings before the ALJ until Corder repaid the money. *Ibid.*; Pet. App. 6a. After a hearing, the ALJ granted petitioner's motion. Although he recognized that there was no enforceable settlement agreement between the parties, *id.* at 6a, the ALJ observed that petitioner had "paid [Corder] the money and performed all of its duties under the Agreement, [but] * * * did not receive the dismissal of this case that both parties had contemplated," *id.*

at 6a-7a. Citing principles of unjust enrichment and restitution, the ALJ determined that petitioner was entitled to the return of its money. *Id.* at 7a-10a. He concluded that those "same principles of equity and justice * * * preclude [Corder] from proceeding with this action" until he returns the funds. *Id.* at 10a. He therefore ordered Corder to refund the money, plus interest, within 90 days following the hearing, subject to the sanction of a recommended order of dismissal with prejudice if Corder failed to do so. *Id.* at 13a-14a.

When the date for payment passed, the ALJ issued an order recommending that Corder's complaint be dismissed with prejudice for failure to prosecute, stating that Corder "is not entitled to further proceedings in connection with this case since restitution has not been made." Pet. App. 4a.

5. The Secretary, relying on his decision in *Macktal* v. *Brown & Root, Inc.*, Case No. 86-ERA-23 (DOL July 11, 1995) (Pet. App. 22a-29a),[4] rejected the ALJ's recommended order of dismissal and remanded the case for further proceedings. Pet. App. 2a-3a. The Secretary ruled in *Macktal*, under circumstances virtually identical to those of this case, that he is without authority to condition the availability of a hearing under the ERA on the complainant's return of settlement proceeds.[5] Noting that "no explicit

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[4] The Secretary issued that decision on remand to the agency of the *Macktal* case decided by the Fifth Circuit, discussed at page 4, *supra*.

[5] The facts of *Macktal* closely parallel those of this case. As in the instant case, the complainant in *Macktal* had received a sum of money to settle his ERA claim, as well as other claims, pursuant to an agreement that the Secretary later rejected. Pet. App. 28a. After the Secretary disapproved the settlement, the ALJ on remand "recommended dismissal because

language in the ERA authorizes the [dismissal] order entered by the ALJ," the Secretary concluded in *Macktal* that "neither an ALJ nor the Secretary ha[s] the power to enter such an order." *Id.* at 24a. In so ruling, the Secretary emphasized that there was "no agreement cognizable under the Act * * * because the Secretary never approved it," and that the agreement resolved other claims, over which the Secretary lacked jurisdiction, in addition to the ERA claim. *Id.* at 28a. There was, the Secretary reasoned, nothing in the ERA that empowered him "to rectify inequitable bargains or order restitution of monies unfairly retained simply because the parties' dispute concerns, among other things, the whistleblower provision of the ERA." *Id.* at 27a. Because he lacked "power to resolve [the parties'] dispute over an alleged partially performed contract to which [he was] not a party," *id.* at 28a, the Secretary concluded that neither he nor the ALJ was authorized to order restitution of the settlement money or to order dismissal of the complaint for failure to comply with such an order.

6. Petitioner sought review of the Secretary's order in the court of appeals, and the Secretary moved to dismiss on the ground that the court of appeals lacked jurisdiction. The Secretary argued that his order remanding for further proceedings was not a reviewable final order under 42 U.S.C. 5851(c) (1988), and that, under *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 114 S. Ct. 1992 (1994), it did not qualify

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[the] Complainant failed to comply with his order directing [the] Complainant to repay [the settlement proceeds] before proceeding to a hearing." *Id.* at 22a-23a. Thus, contrary to petitioner's contention (Pet. 9), *Macktal* does not materially differ from this case.

as an immediately reviewable collateral order. The court of appeals, without opinion, granted the Secretary's motion and dismissed the petition for review. Pet. App. 1a.

ARGUMENT

The bulk of the petition (Pet. 6-21) challenges the Secretary's ruling that he is without authority to dismiss a whistleblower complaint under the Energy Reorganization Act because the complainant failed to disgorge money he received under a settlement agreement disapproved by the Secretary. The court of appeals, however, did not reach that issue, in light of its ruling that it lacked jurisdiction to review the Secretary's nonfinal order remanding this proceeding to an ALJ for a hearing. Indeed, the sole question the petition presents for this Court's review is whether the court of appeals erred in holding that the Secretary's order was not appealable. Pet. i. The court of appeals' summary order dismissing the petition for review of the Secretary's nonfinal order is correct. Moreover, the court's ruling does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioner's contention (Pet. 22-25) that the Secretary's order remanding the case for further proceedings before the ALJ is an immediately reviewable collateral order is foreclosed by this Court's decision in *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 114 S. Ct. 1992 (1994).[6] The collateral

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[6] Petitioner does not dispute that only final orders are reviewable under 42 U.S.C. 5851(c) (1988) or that the Secretary's remand order lacks finality because it fails to terminate the litigation. See *Bell* v. *New Jersey*, 461 U.S. 773, 778

order doctrine represents a "practical" construction of the concept of finality under which, in certain circumstances, a "narrow class of decisions that do not terminate the litigation" may nonetheless be reviewed as final orders. *Id.* at 1995. An order falls within this narrow class only if it conclusively determines a disputed question that is completely separate from the merits of the action, is effectively unreviewable on appeal from a final judgment, and is too important to be denied review. *Quackenbush* v. *Allstate Ins. Co.*, 116 S. Ct. 1712, 1718-1719 (1996); *Digital*, 114 S. Ct. at 1995-1996.

In *Digital*, a unanimous Court held that "an order denying effect to a settlement agreement does not come within the narrow ambit of collateral orders" because it does not involve an important question that could not adequately be vindicated on appeal from a final judgment. 114 S. Ct. at 1994, 2004. In particular, the Court emphasized that the district court's order declining to dismiss a case as provided in a private settlement agreement did not rise to the level of importance of the threatened loss of a statutory or constitutional right not to stand trial, and that any

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(1983) (noting "the strong presumption" that judicial review of agency decisions "will be available only when agency action becomes final"); *Carolina Power & Light Co.* v. *United States Dep't of Labor*, 43 F.3d 912, 914 (4th Cir. 1995) (reviewable "order" under Section 5851(c) means final order). Thus, petitioner's sole justification for appellate jurisdiction is that the Secretary's order should be treated as final under the collateral order doctrine. Cf. *DRG Funding Corp.* v. *Secretary of Housing & Urban Dev.*, 76 F.3d 1212, 1220-1221 (D.C. Cir. 1996) (Ginsburg, J., concurring) (suggesting that collateral order doctrine developed in context of 28 U.S.C. 1291's finality requirement applies to review of agency decisions under the Administrative Procedure Act).

need for immediate vindication of rights conferred by a settlement agreement does not outweigh the substantial interests served by the finality requirement. *Id.* at 2001-2004.

The right not to stand trial that petitioner seeks to vindicate here, like the asserted right at stake in *Digital*, is grounded in a settlement agreement. Digital Equipment Corporation asserted that the plaintiff, "for valuable consideration, promised not to sue." See *Digital*, 114 S. Ct. at 2003. Petitioner similarly claims (*e.g.*, Pet. 23) that payment to Corder under the settlement agreement confers on petitioner a right to avoid a hearing such that Corder, having retained the payment, should not be permitted to proceed. This Court in *Digital*, however, made clear that such a "right by agreement" to avoid a trial "does not rise to the level of importance needed for recognition" under the collateral order doctrine. 114 S. Ct. at 2001. Moreover, petitioner's asserted right not to be subject to a hearing is, if anything, weaker than Digital's because it was acquired under an agreement that petitioner concedes (Pet. 22; see Pet. App. 6a) was never cognizable under the ERA because the Secretary never agreed to it.

Petitioner's attempt (Pet. 22) to characterize its asserted right not to stand trial as arising not from a contractual agreement or settlement, but from the constitutional guarantee of due process, is unavailing. The general rule of procedure is that a party is afforded one appeal at the completion of litigation in the initial tribunal. *E.g.*, *Digital*, 114 S. Ct. at 2004; *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981). "Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice," *Cobbledick* v. *United*

States, 309 U.S. 323, 325 (1940), the court of appeals' refusal to review this case in an interlocutory posture does not deny petitioner due process.[7]

Nor are any due process concerns raised by the Secretary's ruling that petitioner cannot assert an affirmative right to restitution of funds in the ERA proceeding. Petitioner voluntarily paid monies to Corder pursuant to the (partially) invalid settlement agreement. Thus, contrary to petitioner's argument (Pet. 21) that "it is the government's involvement which has resulted in * * * [the] deprivation of due process," neither the ALJ nor the Secretary deprived petitioner of the pertinent funds. Cf. *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773, 789 (1980) (Due Process Clause of Fifth Amendment does not extend beyond direct effects of governmental action).

Petitioner's contention (Pet. 23-24) that, once it is subjected to a hearing it allegedly is entitled to avoid, its loss of rights will be "effectively unreviewable," is indistinguishable from many claims of right "that could be enforced appropriately by pretrial dismissal," but are nonetheless not immediately appealable. *Digital*, 114 S. Ct. at 1998. "[T]he mere identification of some interest that would be 'irretrievably lost,'" never alone justifies collateral order review. *Ibid.*; see *Lauro Lines s.r.l.* v. *Chasser*, 490 U.S. 495, 499 (1989) (declining "to find the costs associated with unnecessary litigation to be enough to warrant allowing * * * immediate appeal"); *Johnson* v. *Jones*, 115 S. Ct. 2151, 2155 (1995) (" 'effectively unreviewable' later

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[7] The ERA hearing procedures available on remand meet the demands of due process. See, *e.g.*, 29 C.F.R. 24.5.

on * * * means that failure to review immediately may well cause *significant* harm") (emphasis added).[8]

The right petitioner asserts is not, at bottom, a right to be free from a hearing, but rather a right to restitution of funds. Petitioner has made no showing that its claim to the funds cannot ultimately be vindicated by other means, such as an action for restitution in state court. See *Digital*, 114 S. Ct. at 2003 (noting availability of contract claim under Utah law); Pet. App. 9a n.2 (noting availability of contract claim under Texas law). That petitioner has failed to establish that its asserted right cannot otherwise be vindicated also weighs against departing from the finality requirement of appellate jurisdiction.

2. As noted above, the court of appeals did not address the merits of the Secretary's remand order,

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[8] Petitioner also fails to present any colorable public policy rationale that warrants immediate review of the Secretary's remand order. There is no merit to petitioner's sweeping claims that the Secretary's remand order undermines the entire administrative adjudicatory system. See, *e.g.*, Pet. 24. The Secretary's existing regulations confer ample authority to conduct and manage full and fair hearings and to impose sanctions, including dismissal of an administrative complaint, for conduct that impinges on the integrity of his administrative proceedings. See, *e.g.*, 29 C.F.R. 18.1(b) (waiver, modification or suspension of rules), 18.6(d) (sanctions for compelling answer), 18.29 (ALJ powers), 18.39 (waiver, dismissal, abandonment of claims), 24.5 (whistleblower hearing procedures); see Pet. App. 45a-52a. The Secretary's remand order in this case does not threaten the availability of any of those procedures in the proper circumstances, but simply reflects, as discussed below, that dismissal for failure to prosecute under 29 C.F.R. 24.5(e)(4)(i)(B) is not available either to enforce Corder's promise not to sue under the invalid settlement agreement or to coerce the refund of money paid under the agreement.

nor is the merits issue encompassed within the question presented to this Court. In any event, review of the merits of the Secretary's order would be unwarranted because the order is correct, and it does not conflict with the decision of any court of appeals.

The ERA provides that unless the Secretary consents to the parties' settlement, the Secretary must issue an order "made on the record after notice and opportunity for public hearing." 42 U.S.C. 5851(b)(2)(A) (1988). The Secretary's regulations authorize an ALJ in certain circumstances to dismiss a claim short of a full hearing, including "[u]pon the failure of the complainant to comply with a lawful order of the administrative law judge." 29 C.F.R. 24.5(e)(4)(i)(B). The Secretary, however, concluded that the ERA did not authorize him or the ALJ to order the refund of money paid under an invalid settlement agreement or to condition the availability of a hearing on compliance with such an order. Pet. App. 27a-28a; cf. *Hogue* v. *Southern R.R.*, 390 U.S. 516, 517 (1968) (per curiam) (injured employee need not tender back consideration received under release based on mutual mistake of fact as a "prerequisite to the filing and maintenance of an action" on the same claim; sum paid would be deducted from any award due). Petitioner identifies no provision in the ERA or the Secretary's regulations that authorizes a refund order. Nor can the ALJ's order be considered an exercise of the adjudicator's "inherent power to manage" (Pet. 18) ERA proceedings, because the order required restitution of proceeds paid under an agreement that was not cognizable under the ERA and that resolved matters beyond the ERA claim. The ALJ's refund order thus was not "lawful" under 29 C.F.R. 24.5(e)(4)(i)(B), and the Secretary correctly concluded that the ALJ erred

in dismissing the claim for failure to comply with that order.

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Neither the question of the correctness of the Secretary's remand order, nor the question of the court of appeals' jurisdiction to review such an order under the collateral order doctrine, is likely to arise with any frequency. Now that it is clear that the Secretary may not sever objectionable provisions of a settlement agreement, see *Macktal* v. *Secretary of Labor*, 923 F.2d 1150 (5th Cir. 1991), and that administrative complaints will not be dismissed based on settlements to which the Secretary does not consent, see *Macktal* v. *Brown & Root, Inc.*, Case No. 86-ERA-23 (DOL July 11, 1995) (Pet. App. 22a-29a), no prudent employer will make payment under a settlement agreement until after the Secretary has approved the entire agreement. Thus, these issues are not ones of an important or recurring nature that might warrant this Court's review in the absence of a circuit conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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